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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JASON I. SANDEFUR, Defendant and Appellant.	A151720, A152650 (San Francisco County Super. Ct. No. 218825)

Appellant Jason I. Sandefur was sentenced to prison for an aggregate term of 16 years after a jury convicted him of two counts of assault with a deadly weapon and one count of resisting arrest, the court found true recidivist allegations, and appellant pled guilty to a single count of soliciting the murder of one of the victims in the original case. In this appeal, appellant originally argued the court should have granted his request for self-representation and should have stricken both of his two prior convictions under the "Three Strikes" law, rather than the one it actually struck. He also argued the trial court erred in setting direct victim restitution. We affirmed the judgment.

The California Supreme Court has directed us to reconsider the matter in light of the advent of Senate Bill 1393, which amends section 667 and section 1385 such that a trial court has discretion to strike a prior serious felony conviction under section 1385. We therefore vacate our earlier decision and, having considered the parties' supplemental briefing, remand the matter to the trial court to decide whether to strike appellant's prior serious felony conviction. We affirm the judgment in all other respects.

I. BACKGROUND

On October 25, 2010, appellant returned to the Prita Hotel in San Francisco, where he had been staying, and was told to leave by manager Eduardo Ugarte. He returned the next day when Ugarte was carrying out equipment for recycling, pulled out a knife, and invited Ugarte to fight. Appellant swung the knife at face level and Ugarte used a vacuum cleaner he was carrying to ward appellant off. Ugarte went inside and told his son to call the police. At about the same time, appellant stabbed Sergio Rodas as Rodas walked along Mission Street, causing a superficial neck wound and a deep wound to the back left of his neck. Appellant fled from and struggled with the police officers who arrested him. He appeared to be under the influence of drugs.

Appellant was charged with attempted murder, two counts of assault with a deadly weapon, one with an allegation of great bodily injury, and resisting arrest. (Pen. Code, §§ 664/187, 245, subd. (a)(1), 12022.7, subd. (a), 148, subd. (a)(1).)[1] It was also alleged that appellant had been previously convicted of assault with a deadly weapon and making criminal threats within the meaning of the Three Strikes law and the five-year serious felony enhancement, and had served a prior prison term for those crimes. (§§ 1170.12, 667, subd. (a), 667.5, subd. (b).)

While he was in custody pending trial on the charges described above, the charges were consolidated with two counts each of solicitation of murder and dissuading a witness. (§§ 653f, subd. (b), 136.1, subd. (b)(1).) These charges, which involved a victim of and witness to the first set of charges, were ultimately severed for trial.

After the denial of numerous motions for self-representation under *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*) and new appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), the case proceeded to a jury trial. Appellant presented expert witnesses to support his theory that he was addicted to drugs and his conduct was the product of drug-induced psychosis. He was acquitted of attempted murder and the lesser included offense of attempted voluntary manslaughter and

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[1] Further statutory references are to the Penal Code.

convicted of the two counts of assault with a deadly weapon (one with a great bodily injury enhancement) and the one count of resisting arrest. The court found appellant had suffered two prior convictions for serious felonies and had served a prior prison term as alleged.

In a separate hearing, the trial court granted a defense motion to strike one of the priors for purposes of the Three Strikes law under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). It declined to strike the other prior. The court initially sentenced appellant to prison for an aggregate term of 16 years on April 28, 2017. The court ordered appellant to pay Ugarte $2,400 in direct victim restitution following a hearing.

With respect to the pending charges, appellant pled guilty to one count of solicitation of murder pursuant to an agreement he would be sentenced to six years in prison. Ultimately, the court resentenced appellant to the same aggregate 16-year term, calculated as follows: the three-year middle term for one assault count, doubled to six years under the Three Strikes law, plus three years for the great bodily injury enhancement; one year consecutive (one-third the middle term) on the other assault count doubled to two years under the Three Strikes law, consecutive; the three-year lower term, concurrent, on the solicitation to commit murder count; and five years consecutive as an enhancement for the prior conviction. Appellant was given time served for the misdemeanor of resisting arrest. The trial court noted that despite the six-year agreement on the solicitation of murder count, the parties were now requesting that the court sentence appellant to three years on that count.

II. DISCUSSION

A. *Motion for Self-Representation*

Appellant first contends the trial court erred in denying his motions for self-representation. We disagree.

At the outset, we note that much of the record in this case, including the *Faretta* hearings at issue and the mental health evaluations underlying the motions, have been filed under seal, and the parties have filed both redacted and unredacted briefs under rule

8.46(f) of the California Rules of Court. We have endeavored in this opinion to maintain the confidentiality of the sealed information and do not refer to the content of the reports; however, we have reviewed them thoroughly.

1. General Principles

Defendants in criminal cases have a federal constitutional right to represent themselves. (*Faretta, supra,* 422 U.S. 806.) This right is not absolute. In *Indiana v. Edwards* (2008) 554 U.S. 164 (*Edwards*), the United States Supreme Court held that states may, but need not, deny self-representation to defendants who, although competent to stand trial, lack the mental health or capacity to represent themselves at trial—persons the court referred to as "gray-area defendants." (*Id*. at p. 174.) "That is to say, the Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Id*. at p. 178) Under *Edwards*, competence to represent oneself at trial is the ability "to carry out the basic tasks needed to present [one's] own defense without the help of counsel." (*Ibid*. at pp. 175–176.)

Prior to *Edwards*, California courts had held that a defendant who was competent to stand trial was competent to represent himself under *Faretta*. (*People v. Gardner* (2014) 231 Cal.App.4th 945, 956 (*Gardner*).) The rule of *Edwards* was extended to California courts in *People v. Johnson* (2012) 53 Cal.4th 519 (*Johnson*). "In so holding, *Johnson* explained that the appropriate standard for trial courts to use in deciding whether to exercise their discretion to deny self-representation 'is simply whether the defendant suffers from a severe mental illness to the point where he or she cannot carry out the basic tasks needed to present the defense without the help of counsel.' " (*Gardner* at p. 956, citing *Johnson* at p. 530.) "In other words, California courts have discretion to deny self-representation to so-called gray-area defendants—those who are mentally competent to stand trial if represented by counsel but not mentally competent to conduct the trial themselves—'in those cases where *Edwards* permits such denial.' " (*Gardner*, at p. 956.)

The Court cautioned that "[s]elf-representation by defendants who wish it and validly waive counsel remains the norm and may not be denied lightly." (*Johnson*, at p. 531.)

The determination of whether a defendant is competent to represent himself is committed to the trial court's sound discretion and will not be disturbed absent an abuse of that discretion. (*People v. McArthur* (1992) 11 Cal.App.4th 619, 627.) "As with other determinations regarding self-representation, we must defer largely to the trial court's discretion. [Citations.] The trial court's determination regarding a defendant's competence must be upheld if supported by substantial evidence. [Citation.] Such deference is especially appropriate when, as here, the same judge has observed the defendant on numerous occasions."[2] (*Johnson, supra*, 53 Cal.4th at p. 531.) Error in denying a motion for self-representation is reversible per se. (*Gardner*, *supra*, 231 Cal.App.4th at p. 956–957.)

2. Motions under *Faretta*

Three written mental health evaluations of appellant were prepared prior to appellant's trial in this case: a November 2013 evaluation by Dr. Paul Good, Ph.D., a January 2014 evaluation by psychiatrist Dr. Jeff Gould, and a March 2015 evaluation pursuant to Evidence Code section 730 by Amy Watt, Ph.D. Appellant brought a motion to represent himself before the trial began, and was apparently "provisionally" granted pro per status by Judge Conroy. Judge Chan reviewed the request, conducted an in camera hearing, reviewed the written evaluations, and denied the request on April 14, 2015. He cited *Gardner*, *supra*, 231 Cal.App.4th 945, and stated, "I'm exercising my discretion after considering the opinions of Dr. Watt contained within the [written] report, especially as it relates to the ability to process cognitively the sort of information that is required for the task involving self-representation." Judge Chan observed that some of the things appellant said during the hearing on the motion supported the denial of his

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[2] We do not agree with the Attorney General's suggestion that our review is de novo. To the extent the Supreme Court decisions in this area appear in conflict (see *People v. Kootnz* (2002) 27 Cal.4th 1041, 1070 [issues regarding *Faretta* subject to de novo review]), we follow the more recent pronouncements by that Court. (*Johnson, supra,* 53 Cal.4th at p. 531.)

request. On May 11, 2015, Judge Chan denied appellant's request for reconsideration of the ruling.

Dr. Watt prepared an updated report in February 2016, pursuant to Evidence Code section 730. A new *Faretta* motion was heard by Judge Jackson, who reviewed the updated report and on March 3, 2016 ruled that appellant was not capable of self-representation. Appellant disputed the ruling, arguing that if he had the capacity to stand trial, he should be allowed to represent himself. Judge Jackson did not change her ruling and stated, "Based on the report submitted by Dr. Amy Watt, you are not competent to conduct the proceeding by yourself, and the Court can deny self-representation under [*Edwards*, *supra*,] 554 U.S. 164, as well as [*Johnson*, *supra*,] 53 Cal.4th 519. . . .You don't have the ability to understand the cause and effect as well as the complexity of the information and processing it."

On September 13, 2016, appellant executed a *Faretta* waiver indicating he had graduated from high school and completed two years of college. On September 20, 2016, Judge Jackson conducted another hearing and denied the *Faretta* motion. Judge Jackson indicated the ruling was based on the reports by Dr. Watt as well as the court's observations of appellant during hearings on motions for substitute counsel (also confidential) held under *Marsden*, *supra*, 2 Cal.3d 118.

Trial before a jury commenced on November 16, 2016.

3. Analysis

As previously stated, most of the reports and hearings forming the basis for the court's denial of appellant's request for self-representation are confidential. We have reviewed those materials thoroughly. Applying a deferential standard to the ruling as articulated in *Johnson*, *supra*, 53 Cal.4th at p. 531, substantial evidence supported the conclusion that appellant did not have the capacity to conduct a trial on his own behalf and the trial court did not abuse its discretion in denying his *Faretta* motions.

B. *Motion to Strike*

The Three Strikes allegations in this case were based on appellant's 2005 convictions of criminal threats under section 422 and assault with a deadly weapon under

section 245, subdivision (a)(1), based on a single incident in which he struck a 67-year-old man with a pipe and said, "I'm not through with you yet." Pursuant to a defense motion, the trial court struck the prior conviction under section 422 because (1) it arose from the same course of conduct as the conviction under section 245, subdivision (a)(1); (2) the victim in the prior case did not suffer significant injuries; (3) the strikes were almost 12 years old and appellant's remaining criminal history was almost exclusively based on narcotics violations; (4) appellant's criminal conduct was partly excusable due to his mental health and addiction to narcotics; (5) even with the striking of the prior, the sentence was substantial; and (6) appellant had acknowledged guilt during pretrial negotiations. Appellant argues that the trial court abused its discretion in failing to strike both prior strike convictions in the interests of justice under section 1385 and *Romero*. We disagree.

In *Romero*, the Court held that the Three Strikes law did not preclude the trial court from exercising its power under section 1385, subdivision (a), to dismiss a prior conviction allegation in the furtherance of justice. (*Romero*, *supra*, 13 Cal.4th at p. 530.) In ruling on a motion to dismiss a prior strike allegation, the court must consider "whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We review a court's decision not to dismiss or strike a prior serious or violent felony conviction allegation for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 374–375 (*Carmony*).) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at p. 377.)

Appellant argues the trial court abused its discretion because he had a long history of mental health problems and his prior convictions were almost exclusively for narcotics offenses. He contends that all of the factors relied upon by the court to strike one prior applied with equal force to the other. But the trial court took appellant's mental problems

and narcotics addiction into account when it struck one of two priors. Appellant's argument essentially is asking this court to reweigh the evidence. " 'Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, [the reviewing court] shall affirm the trial court's ruling, even if [it] might have ruled differently in the first instance.' " (*Carmony*, *supra*, 33 Cal.4th at p. 378.)

Moreover, a number of factors militated against striking both priors in this case. First, the current case, though apparently fueled by drug abuse, involved both a weapon and great bodily injury and was consequently more serious than the prior. Second, while the prior case did not involve substantial injury, it did involve an apparent ambush on an elderly victim. Third, although the court referenced the 12 years between the prior conviction and the date of sentencing, only five years elapsed between the prior conviction and the time of commission of the current offense. Fourth, at the time the *Romero* motion was denied, appellant had outstanding charges based on a separate incident for which he ultimately pled guilty to solicitation of murder. The trial court could reasonably conclude that while the 25-year-life prison sentence applied to Three Strikers was not appropriate in this case, appellant was not completely outside the spirit of the Three Strikes law.

C. *Direct Victim Restitution*

After a hearing, the trial court ordered appellant to pay $2,400 in direct victim restitution to victim Eduardo Ugarte: $1,500 for psychological services, $800 in lost wages, and $100 in travel. These amounts were based primarily on a three-page form submitted by Ugarte to the probation officer.[3] Appellant argues that the trial court abused its discretion in making the order because (1) there was no evidence Ugarte or his insurer had in fact paid for psychological treatment, (2) there was no factual basis for Ugarte's claim that he had lost $800 in wages or paid $100 in transportation; and (3) the $100 for transportation was unreasonable.

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[3] Copies of the form and related documents are not a part of the record and are apparently unavailable for review, though they are described in the record.

Crime victims have been afforded both constitutional and statutory rights to restitution in California. (Cal. Const., art. I, § 28(b); § 1202.4.) "[A] crime victim is entitled to restitution for 'any economic loss' incurred as the result of the defendant's criminal activity" (*People v. Ortiz* (1997) 53 Cal.App.4th 791, 798) and " ' "[a] victim's restitution right is to be broadly and liberally construed." ' " (*People v. Baker* (2005) 126 Cal.App.4th 463, 467.) The restitution order " 'shall be of a dollar amount sufficient to fully reimburse the victim' for economic losses caused by the defendant's criminal conduct." (*People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409.)

"At a victim restitution hearing, a prima facie case for restitution is made by the People based in part on a victim's testimony on, or other claim or statement of, the amount of his or her economic loss. [Citations.] 'Once the victim has [i.e., the People have] made a prima facie showing of his or her loss, the burden shifts to the defendant to demonstrate that the amount of the loss is other than that claimed by the victim.' [Citations.]" (*People v. Millard* (2009) 175 Cal.App.4th 7, 26.) The standard of review is abuse of discretion, and when there is a " ' " factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court." ' " (*Ibid*.)

Awarding the $1,500 for psychological services was not an abuse of discretion. Accepting that there was no evidence Ugarte or his insurer had as of yet paid the bill (and we note that the record reflects a bill of $1,500 and a balance of zero, supporting an inference that Ugarte or his insurer did pay the bill), he was liable for the full amount stated. Unlike *Millard, supra,* 175 Cal.App.4th at p. 27, on which appellant relies, there is no indication the provider of services had accepted or would accept less money in payment of this bill. (See also *In re Anthony M.* (2007) 156 Cal.App.4th 1010, 1017–1018 [victim not entitled to restitution in excess of Medi-Cal lien in amount accepted by provider as payment].) The trial court did not abuse its discretion in ordering that appellant compensate Ugarte for psychological services. (*Millard* at p. 26.)

As for the $800 in lost earnings and $100 in transportation ($900), appellant notes that Ugarte made one appearance to testify at the preliminary hearing and one appearance

to testify at trial, and only lived 1.7 miles from the courthouse. He argues that consequently, the prosecution failed to state a prima facie case for $800 in lost wages for these "two relatively brief court appearances" plus $100 in transportation. But the amount claimed could include meetings with the district attorney and police, as well as psychological treatment. (§ 1202.4, subd. (f)(3)(E), (F).) Although Ugarte and the district attorney could perhaps have supplied more details about Ugarte's lost wages and transportation costs, they made a prima facie showing. We cannot say the trial court abused its discretion in determining that appellant did not rebut the evidence supporting $900 in restitution.

D. *Five-Year Serious Felony Enhancement/Senate Bill 1393*

Senate Bill 1393 applies retroactively to all cases not yet final. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 (*Garcia*).) As appellant's judgment was not final as of January 1, 2019, the date the bill went into effect, we agree it applies to him.

We next decide whether remand is necessary in light of the record. In *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081, the court suggested (in the context of Senate Bill 620) that remand is required regardless of anything the trial court said at the original sentencing, because the sentencing court was not at that time aware of the full scope of its discretion. Other decisions hold that remand is required " 'unless the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [an] enhancement.' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425; see also *People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; *Garcia*, *supra*, 28 Cal.App.5th at p. 973, fn. 3.) Applying *McDaniels*, *Almanza* and *Garcia* here, the question is whether the trial court clearly indicated it would not have stricken appellant's prior conviction if it had discretion to do so under section 1385.

Senate Bill 1393 requires dismissal of an enhancement "in furtherance of justice." (§ 1385, subd. (a).) Similarly, motions to dismiss a prior strike under *Romero* involve the "furtherance of justice" standard. (*Romero, supra,* 13 Cal.4th 497, at p. 530.) Here, the court struck one of appellant's prior convictions under *Romero*, citing factors that would be applicable to the five-year prior as well, including appellant's mental health problems

and narcotics addiction, his criminal history of primarily narcotics-based offenses, and the lack of serious injury to the victim in the prior case. The court's comments do not clearly indicate it would not have dismissed the prior serious felony enhancement based on the circumstances of the crime and appellant's recidivism and dangerousness.

Upon full consideration, we conclude that justice will best be assured if the trial court has an opportunity to decide whether to exercise its discretion to strike appellant's prior serious felony conviction in light of Senate Bill 1393's amendments to sections 667 and 1385. We will remand for that purpose. We express no view as to how the trial court should exercise its new-found discretion.

III. DISPOSITION

Our decision of September 20, 2018 is vacated. The matter is remanded for the trial court to consider whether to exercise its discretion to strike appellant's prior serious felony conviction for purposes of sections 667 and 1385, as those sections have been amended by Senate Bill 1393. If the trial court strikes appellant's prior serious felony conviction, it shall resentence appellant. In all other respects, the judgment is affirmed.

NEEDHAM, J.

We concur.

JONES, P.J.

BRUINIERS, J*

(A151720, A152650)

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice purusant to article VI, section 6 of the California Constitution.